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No. 1269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

On Appeal From the United States District Court for the Eastern District of Kentucky

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BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellant moved to intervene in this case to oppose entry of a consent decree proposed by the United States and appellee banks and to urge the court to enter instead a decree of divestiture. The court granted appellant's motion for intervention. In the same order, however, it terminated the action and directed that the consent decree be entered. Appellees' defense of the court's action warrants a brief response.

ARGUMENT

(1) The United States argues that the consent judgment afforded reasonable relief "once it was recognized that in the immediate circumstances divestiture was simply unavailable" since no court had yet found the

combination in violation of Section 2 of the Sherman Act. (Mot. to Aff. 11). Acknowledging that First Security's 90 percent "domination of trust department services in Fayette County offered a far more encouraging [Section 2] case [than the bank's 50 percent share of all banking services]," the United States suggests that "even here [it] would have had to refute legislative history which admits of an argument that Congress in 1966 intended to excuse this merger altogether from antitrust liability" (*id.* at 10).[1] The short answer is that there are no impediments to divestiture (J.S. 22 fn. 7), and the legislative history of the Bank Merger Act of 1966 makes abundantly clear that appellee banks were not intended to be absolved from the consequences of Section 2 violations. See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3 (1966). Indeed, the Government's own reading of this legislative history is that it "indicates that Congress intended to forgive this and two other bank mergers from all antitrust liability *except for monopolization under Section 2 of the Sherman Act*" (Mot. to Aff. 10 fn. 8, emphasis added).[2]

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[1] Appellee banks themselves apparently recognize the strength of the Section 2 claims in the trust field, stating that "the only violation of Section 2 that could realistically have been expected would have related to the sub-market of corporate trust services, . . ." (Mot. to Aff. 11).

[2] Congress was well aware of the Section 2 count in the complaint against appellee banks. For example, Representative Patman inserted into the record a chart which pointed out that the suit against appellee banks alleged "violations of secs. 1 and 2 of the Sherman Act." That chart also highlighted the banks' argument to the district court "that a preliminary injunction should not be issued because [they] recognized that should the Government prevail on the merits, divestiture would be appropriate relief which [they] were prepared to effectuate." *The 6 Challenged Bank Mergers S. 1698 Would Protect,* Hearings on S. 1698 (and related bills) before a Subcommittee of the House Committee on Banking and Currency, 89th Cong., 1st Sess., chart following p. 38 (1965).

Beyond this, the consent decree entered by the district court does not provide adequate relief in any sense of that phrase (see J.S. 22-24). The main portion of the decree restricts First Security's acquisition of new *non-testamentary* trust accounts. Appellant submitted to the district court an affidavit alleging that this restriction was insubstantial because First Security's principal trust business is "testamentary" (Doc. 222, Kincaid Affidavit, p. 5). Appellee banks—which surely are in the best position to know the facts—have never controverted the affiant's statement (see, *e.g.*, Mot. to Aff. 11 fn. 18).

The Government, citing only the argument of its counsel in the court below, observes merely that "it *appears* that nontestamentary accounts provide the most important aspect of First Security's trust business" (Mot. to Aff. 16 fn. 13, emphasis added). In other words, on this crucial aspect of the decree, the United States apparently agreed to limit the scope of the prohibition without knowing the precise facts.[3] The consent decree, in short, is inadequate and contrary to the public interest, for, as the court below found, it effected a "ninety percent capitulation" to the defendants by the United States (J.S. App. B, p. 7a).

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[3] Appellant also argues that the decree's prohibition against acquiring new non-testamentary accounts is itself inadequate because accounts of advisory directors are excluded from the ban (J.S. 24). Appellees contend that if this exception is abused relief can be had at "a later date" (Gov't Mot. to Aff. 16 fn. 13; Bank Mot. to Aff. 10 fn. 16). This contention misses the point. The court's retained jurisdiction to modify consent decrees is not intended to substitute for entry of an adequate decree in the first instance. It is intended merely to redress unforeseen contingencies. Patent loopholes, such as this one, have no place in any decree reasonably calculated to pry open to competition a market foreclosed by an unlawful monopolization.

(2) Appellant also argues that the district court erred in permitting it to intervene as of right while simultaneously terminating the litigation and entering the consent decree appellant had intervened to oppose (J.S. 13-15). The Government admits that these facts raise "a novel issue under the amended rules of civil procedure."[4] Moreover, in the past the Government has acknowledged that intervenors have a right to participate in settlement negotiations and, if unsatisfied, to "insist on a litigated proceeding" (J.S. 14). Without mentioning its previous position the United States now asserts that the rights of an intervenor may be limited to presenting argument and appealing (Mot. to Aff. 6-7).

The Government's shifting position on this question underscores its importance in the proper enforcement of the antitrust laws. It is of course true that when the Government argued that intervenors have equal rights with original parties, it was urging this Court not to permit intervention in antitrust cases. The Court, however, disagreed and held in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967), that persons situated in appellant's position have a right to intervene and be heard on questions of relief—"the entire merits of the case must be reopened to give [the applicants] an opportunity to be heard as of right as intervenors . . . ." In order for that right to be meaningful, an intervenor must be able

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[4] Letter from Solicitor General Griswold to Honorable John F. Davis (dated April 18, 1968), requesting an extension of time for responding to the jurisdictional statements in this appeal and No. 1270.

to do more than present argument (in the same manner as an *amicus curiae*) and appeal if dissatisfied with the result.

The Government contends, as a matter of policy, that it and the defendants must be permitted to settle antitrust cases "*on whatever terms they deem appropriate,*" for "[t]o allow a private intervenor to veto a consent judgment would elevate his private interest over the public interest represented by the Attorney General" (Mot. to Aff. 7, emphasis added). This argument is little more than a rehash of the Government's original reasoning in *El Paso* that intervention is not appropriate in antitrust cases.[5] Furthermore, in this particular case, the argument ignores the fact that appellant sought intervention below for the express reason that the United States was not adequately protecting the "public interest" in competition by agreeing to the consent decree (see Central's Complaint, reprinted in Gov't Mot. to Aff. App. B, pp. 19-22). The court below properly granted intervention. It erred, however, in not thereafter affording appellant the rights of a party plaintiff.

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[5] Compare the following statements with the language quoted above:

"The congressional purposes would be thwarted if private antitrust suitors had standing to challenge the government's handling of its cases and to usurp its function . . ." (Brief for the United States in Nos. 4, 5 and 24, O.T. 1966, p. 37).

"[W]e submit, it has never been thought the proper office of the judiciary to review the wisdom of the Attorney General's decision to settle rather than to sue" (*id.* at 36).

CONCLUSION

For the foregoing reasons and those set forth in the jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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